

No. 9561

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FIRST PRESBYTERIAN CHURCH OF SANTA BARBARA,
CALIFORNIA, a religious corporation,

Appellant,

vs.

M. L. RABBITT, as Trustee in Bankruptcy of the Bankrupt
Estate of James Marwick, and JAMES MARWICK,

Respondents and Appellees.

APPELLANT'S OPENING BRIEF.

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

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TOPICAL INDEX.

	PAGE
Statement of Pleadings and Jurisdiction.....	1
Specification of Errors.....	3
Statement of Facts.....	4
Argument	7

I.

The court was in error in finding and deciding that the deed of 1932 and the declaration of trust of 1927 were not supported by consideration.....	7
--	---

II.

The declaration of trust constituted a transfer of the property in question, and was made while Marwick was solvent and prior to the date upon which the obligations pleaded and proved arose, and was, therefore, not a transfer void as to existing creditors, even in the absence of consideration.....	9
--	---

III.

The action commenced by the plaintiff herein is barred by the Statutes of Limitations of the State of California.....	12
Summary	17
Conclusion	18

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Burling v. Newlands, 4 Cal. Unrep. 940, 39 Pac. 49.....	14
First Trust and Savings Bank v. Coe College, 8 Cal. App. (2d) 195, 47 Pac. (2d) 481.....	9
Hecht v. Slaney, 72 Cal. 363, 14 Pac. 88.....	14
Lady Washington Co. v. Wood, 113 Cal. 482, 45 Pac. 809.....	14
Lamb, In re, 61 Cal. App. 321, 215 Pac. 109.....	11
Loeffler v. Wright, 13 Cal. App. 224, 109 Pac. 269.....	14
Lynch v. Rooney, 112 Cal. 279, 44 Pac. 565.....	11
Schell v. Gamble, 153 Cal. 448, 95 Pac. 870.....	10
Teall v. Schroder, 158 U. S. 173, 39 L. Ed. 938.....	14
University of Southern California v. Bryson, 103 Cal. App. 39, 283 Pac. 949	9
Wheaton v. Nolan, 3 Cal. App. (2d) 401, 39 Pac. (2d) 459....	14
Wright v. Street, 3 Cal. (2d) 146, 44 Pac. (2d) 322.....	11

STATUTES.

Bankruptcy Act, Sec. 70-e.....	2, 9
California Civil Code, Sec. 3439.....	2, 9, 10
California Civil Code, Sec. 3442.....	2, 9, 10
California Code of Civil Procedure, Sec. 312.....	12
California Code of Civil Procedure, Sec. 318.....	2
California Code of Civil Procedure, Sec. 319.....	2
California Code of Civil Procedure, Secs. 338-4	
.....	2, 12, 13, 14, 18

TEXTBOOKS.

76 American Law Reports, 869-870.....	16
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APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Jurisdiction.

This is a plenary action in equity by a trustee in bankruptcy to set aside a deed to certain property located in the County of Santa Barbara, State of California, by the bankrupt, James Marwick, a defendant herein, to defendant and appellant herein, First Presbyterian Church of Santa Barbara, California, a non-profit corporation. The bill in equity sets forth that the deed was given without consideration at a time when the bankrupt was insolvent and further alleges that the deed was given and received with a guilty intent to defraud the creditors of the bankrupt. Both Marwick and the Church are made defend-

ants and both defendants answered, the respective answers being essentially the same. The answers deny any guilty intent to defraud creditors, deny that the deed was given without consideration, affirmatively allege that the property was transferred for an adequate consideration and by a prior declaration of trust made and executed by Marwick, and that the deed sought to be set aside was given in pursuance of the said former transfer by deed of trust, and affirmatively allege that any action to set aside the deed is barred by the statute of limitations (California Civil Code of Procedure, Sections 338-4, 318, 319). The declaration of trust and the deed alleged to have been given in pursuance thereof (the deed sought to be set aside in these proceedings) being set forth verbatim in the answers.

The action is brought under Section 70-e of the Bankruptcy Act, making applicable California Civil Code, Sections 3439 and 3442 to the transfer in question.

Specification of Error.

In view of the fact that there was essentially no conflict in the evidence, and essentially no dispute over the factual background in these proceedings, appellant's specifications of error are directed to the application of the law to the facts of the case as demonstrated by the evidence; the findings of fact as drawn [Tr. pp. 28 to 31, incl.], are more in the nature of a series of conclusions of law than findings of a factual nature, though the facts as hereinafter set forth are therein contained, intermingled with purely legal conclusions. The memorandum opinion of the court [Tr. pp. 20 to 27, incl.] clarifies the formal findings.

The specifications of error by defendant and appellant fall into three successive steps:

1. The court erred in determining that the deed of 1932 was given without consideration, in the light of the evidence and the declaration of trust dated in 1927.

2. The court erred in determining that the transfer was made by the deed of 1932 instead of the declaration of trust of 1927, and that the transfer was, therefore, made while the bankrupt was insolvent.

3. The court erred in determining that the action to set aside the deed of 1932 was not barred by the statute of limitations of the State of California.

Statement of Facts.

At the trial of this action there was little controversy over the facts and essentially no conflicts in the evidence, and, with one exception, there has been no controversy upon the effect of the evidence, that is, what conclusion of fact the evidence established. Briefly stated, the facts are as follows:

In January of the year 1927, the defendant, First Presbyterian Church, was attempting to secure subscriptions of funds from its members. At a meeting conducted by a minister named Snivley, the defendant Marwick was brought forward on the platform of the Church by Snivley, who then announced to the assembled congregation that Marwick had made a subscription in the sum of \$25,000.00 towards liquidating the Church debt. Upon the strength of this subscription and induced thereby Mr. George W. Wilson, (the witness establishing the foregoing) Harry Gentry, (a friend of the witness) and others made substantial subscriptions to the Church. These subscriptions were paid [Tr. pp. 77, 78 and 79]. Later, on the 28th day of November, 1927, Marwick executed and delivered to the Church a document which may for convenience be referred to as the trust deed [Tr. pp. 79, 80, 81, 82 and 83]. This trust deed recites that whereas Marwick had theretofore made a pledge in the sum of \$25,000.00 to the Church for the reconstruction of the house of worship predicated upon his being able to sell certain property (not that involved in this action) for a sum sufficient to enable him to pay the pledge, and whereas Marwick had not been able to sell the same for a sufficient sum, and wished to secure to the Church the pledged money; that therefore Marwick owned and held certain other property (described) in trust for and as

security for the payment of the pledge, and that if the pledge were not paid, or the pledgor died within ten years, the Church should take record title to the property described (the property here involved). Except for the sum of \$500.00, the pledge was never paid by Marwick [Tr. p. 91]. On the 26th day of March, 1932, Marwick, finding himself in such a position that he would not be able to pay the pledge because of his age and financial condition, executed and delivered to the Church a deed absolute to the property in question and therein described [Tr. pp. 62, 63, 64, 65, 66, 67 and 68]. This deed, which is very voluminous for such a document, recites the making of the trust deed and its recordation, and further recites that the deed absolute was given in consideration of the Church's release of Mr. Marwick from the obligation of his pledge. This deed, together with a release by the Church thereto attached, was duly recorded in the office of the recorder of the County of Santa Barbara, State of California, the county wherein the property in question is situated, on the 30th day of March, 1932 [Tr. pp. 68 and 69]. The so-called trust deed or declaration of trust had been previously recorded on the 24th day of March, 1932 [Tr. p. 83]. At the date of the making and delivery of the deed absolute, Marwick was insolvent and the Church had knowledge of this fact [Tr. pp. 69 and 70]. No money or property was given by the Church to Marwick in consideration of the deed [Tr. p. 51]. On July 10, 1936, Marwick was duly adjudicated to be a bankrupt [Tr. p. 76], and plaintiff herein is the duly appointed and qualified trustee in bankruptcy in the proceedings therein. Two claims were filed in the bankruptcy proceedings, one by Marie Scheinman arising out of a promissory note made and executed by Marwick on the 1st day of December, 1927, and reduced to judgment before the

Superior Court, Los Angeles county, on the 21st day of September, 1932, in the sum of approximately \$57,000.00, and by the Assets Corporation upon a promissory note made, executed and delivered by James Marwick to Security-First National Bank of Los Angeles on the 14th day of August, 1928, and reduced to judgment before the Superior Court, Los Angeles county, on the 26th day of February, 1936, in the sum of \$14,853.66. There have not been assets in said bankruptcy estate sufficient to pay the claims [Tr. pp. 42 and 43]. The value of the property here involved is not and has not been more than \$10,000.00. The within action was commenced on the 29th day of July, 1938, by plaintiff to set aside the said deed absolute and to obtain an adjudication that the trustee was and is the owner of the property therein described upon the grounds that the deed absolute constituted a transfer both actually and constructively fraudulent. Upon hearing, the court determined that the deed was a constructively fraudulent but not an actually fraudulent transfer [Court's Memorandum of Conclusions, Tr. p. 20], and made its order setting aside the deed. Defendant Marwick appeared by answer, but at the commencement of the trial appeared by attorney, and disclaimed any and all interest in and to the property involved and asked to be excused from further appearance in the matter, which request was granted by the court [Tr. pp. 33 and 34].

ARGUMENT.

I.

The Court Was in Error in Finding and Deciding That the Deed of 1932 and the Declaration of Trust of 1927 Were Not Supported by Consideration.

A. The evidence shows without contradiction that in January of 1927, Marwick, at a meeting of the Church members, made a subscription to the Church in the sum of \$25,000.00, "to pay off the Church debt". Upon the strength of that subscription, induced by it and in consideration of it, other members of the congregation made and paid substantial subscriptions [Tr. pp. 77, 78 and 79]. On the 28th of November, 1927, Marwick made and executed a certain declaration of trust, by the terms of which it is recited that he, Marwick, having theretofore made a pledge in the sum of \$25,000.00 to be applied toward the reconstruction of the house of worship of the Church, such pledge being predicated upon his ability to sell certain property, and whereas he was not able to sell the property under terms that enabled him to pay the pledge (the property mentioned not being the property involved here), he therefore owned and held certain described property (the property here involved) in trust for, and as security for, the payment of the said pledge. Later, on the 26th day of March, 1932, Marwick made, executed and delivered a deed wherein he recited that he had theretofore made a pledge secured by the declaration of trust, and that the Church was willing to release him from

further obligation for the fee title to the property in said declaration of trust described, and that in consideration of such release, he conveyed the property to the Church. On March 29, 1932, the Church executed the release [Tr. pp. 62 to 69].

B. In the light of the foregoing, the trial court held and decided that the pledge established by the oral testimony of Mr. Wilson and that recited by the declaration of trust were either not the same pledge, or Mr. Wilson's testimony was inaccurate. This conclusion on the part of the court is drawn from the differences between the recitations in the declaration of trust and the pledge as established by the oral testimony, Mr. Wilson testifying that the pledge, as made from the Church, was unqualified and made for the purpose of liquidating the Church debt, and the recitations in the declaration being that the pledge was conditioned on sale of certain property, and that the pledge was toward the reconstruction of the house of worship [Court's Memorandum Opinion, Tr. pp. 20, 21, 22 and 23].

It is the contention of appellant that the inference drawn by the court is unwarranted; the Church debt may well have been for reconstruction thereof; the two recitations are not inherently inconsistent; the qualification may not have been expressed, at the time of making the pledge, as the evidence indicates, and may have later been inserted. The conclusion of the court is important for the reason that if the pledges are identical, and, as the witness Wilson testified, there was consideration for the transfer.

Where members of an organization make pledges thereto, each induced by the others so to do, the pledges are supported by consideration.

First Trust and Savings Bank v. Coe College,
8 Cal. App. (2d) 195, 47 Pac. (2d) 481;

University of Southern California v. Bryson, 103
Cal. App. 39, 283 Pac. 949.

On the other hand, if, as the court decided, the terms of the pledge or subscription are to be determined from the recitations contained in the declaration of trust alone, the subscription was conditional and not enforceable.

II.

The Declaration of Trust Constituted a Transfer of the Property in Question, and Was Made While Marwick Was Solvent and Prior to the Date Upon Which the Obligations Pleaded and Proved Arose, and Was, Therefore, Not a Transfer Void as to Existing Creditors, Even in the Absence of Consideration.

A. Section 70-e of the Bankruptcy Act provides that a transfer void under the state law of the state wherein the bankruptcy court is located shall be void as to the trustee, and it shall be the duty of the trustee to recover the property transferred by action either in the state or federal courts. The foregoing brings into effect Sections 3439 and 3442 of the Civil Code of the State of California as they existed in 1932; in 1939, California enacted the Uniform Fraudulent Conveyances Act, which repealed these sections. We are not here concerned with the modification of the provisions by the new legislation.

Civil Code, Section 3439, provided:

“Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor.”

Civil Code, Section 3442, provided:

“In all cases arising under section twelve hundred and twenty-seven, or under the provisions of this title, except as otherwise provided in section thirty-four hundred and forty, the question of fraudulent intent is one of fact and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration; provided, however, that any transfer or incumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors.”

The foregoing provisions render transfers voidable only when made while the transferor is insolvent and then only as to “existing” creditors.

Schell v. Gamble, 153 Cal. 448, 95 Pac. 870.

There is nothing in the record that even suggests that Marwick was insolvent at the date of the declaration of trust, Nov. 28, 1927, and the earliest obligation owed by Marwick is the note dated December 1, 1927; the record is silent as to whether or not Marwick had any creditors at the date of the execution and delivery of the trust deed. According to plaintiff's proof, only two

creditors presented claims in the bankruptcy proceedings [Tr. pp. 41 and 42]. No attempt was made to establish that any obligations against Marwick existed prior to the Scheinman note (Dec. 1, 1927). The second obligation did not arise until August 14, 1928.

B. A written declaration of trust whereby the owner of property declares that he holds it in trust for a named beneficiary is a transfer of the property mentioned.

In re Lamb, 61 Cal. App. 321, 215 Pac. 109;

Lynch v. Rooney, 112 Cal. 279, 44 Pac. 565;

Wright v. Street, 3 Cal. (2d) 146, 44 Pac. (2d) 322.

Wright v. Street, *supra*, is remarkably similar to the instant case. There a mother executed a document by the terms of which she declared that she held certain property in trust for her daughter; she retained possession of the property for years and did not record the declaration; further she used the property, representing it to be her own to obtain credit; later she gave the daughter a deed to the property and was declared a bankrupt; the trustee brought action in the state courts to set aside the deed; the Supreme Court of the State of California declared that the declaration of trust was the actual transfer, the deed being in conformity thereto could not be set aside.

It is difficult to see how the recent declaration of the Supreme Court of the State of California in *Wright v. Street* can be reconciled with the decision of the trial court in this case. The cases are nearly identical, and, as it is the law of the State of California that is being enforced in this action, *Wright v. Street* is binding and controlling upon the Federal courts in these proceedings.

III.

The Action Commenced by the Plaintiff Herein Is Barred by the Statutes of Limitations of the State of California.

A. The action being founded upon a California statute, it is elemental that the action would be barred by the statutes of the same state limiting proceedings.

B. The statutes of the State of California barred the proceedings herein maintained three years after the recordation of the deed in question.

Section 312 of the Code of Civil Procedure provides:

“Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute.”

Section 338-4 of the Code of Civil Procedure provides:

“Within three years:

“4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.”

Chronologically the pertinent events relating to the running of the statute are as follows:

November 28, 1927, execution and delivery of the declaration of trust by Marwick.

March 24, 1932, recordation of the said declaration of trust with the County Recorder, Santa Barbara, California.

March 26, 1932, execution and delivery of the deed by Marwick.

March 30, 1932, recordation of the said deed with the County Recorder, Santa Barbara, California.

July 10, 1936, Marwick adjudicated to be a bankrupt.

May 16, 1938, plaintiff appointed trustee in the bankruptcy proceedings.

July 29, 1938, the within action was commenced.

Both the deed and declaration of trust were duly recorded in March of 1932; Marwick was not adjudicated to be a bankrupt until approximately four years and four months later. The action herein was not commenced until July of 1938, more than six years after the recordation of the documents. Section 338-4 of the Code of Civil Procedure bars the proceedings herein maintained in three years. It had, therefore, been barred approximately one year and four months prior to Marwick's being adjudicated a bankrupt.

C. Plaintiff and respondent seeks to avoid the effect of the Code of Civil Procedure, Section 338-4, on the grounds that the creditor, Scheinman, had no actual notice of the transfer set forth in the declaration of trust and the deed. This contention, followed by the trial court in its decision, ignores the element of constructive notice. It is an elemental principle of law that recorded documents, relating to the transfer of real property, are constructive notice of their contents. California courts have repeatedly held that matters lying in the public rec-

ord are constructive notice sufficient to commence the running of the statutes of limitation.

Lady Washington Co. v. Wood, 113 Cal. 482, 45 Pac. 809;

Hecht v. Slaney, 72 Cal. 363, 14 Pac. 88;

Loeffler v. Wright, 13 Cal. App. 224, 109 Pac. 269;

Burling v. Newlands, 4 Cal. Unrep. 940, 39 Pac. 49;

Wheaton v. Nolan, 3 Cal. App. (2d) 401, 39 Pac. (2d) 459.

The Supreme Court of the United States has also declared itself on this question, holding that public record of a deed is sufficient notice to commence the running of the statutory period set forth in California Code of Civil Procedure, Section 338-4.

Teall v. Schroder, 158 U. S. 173, 39 L. Ed. 938.

The foregoing was an action in equity to force transfer by the defendants to plaintiff of certain lands in California alleged to have been fraudulently conveyed by an attorney in fact of an ancestor of the plaintiffs; a demurrer was sustained to the complaint without leave to amend, and upon appeal from judgment of dismissal the Supreme Court says:

“The law of the state creating the limitations, to which particular reference was made, is found in section nineteen of the Act defining the time for commencing civil actions, passed April 22, 1850; and

in subdivision four of section 338 of the Code of Civil Procedure of California; and further, it was contended that the alleged causes of complaint had become stale because of the lapse of time, according to the general principles of equity, and that the complainants had been guilty of laches in failing to attempt the enforcement of the same at the proper time, and it was insisted that so long a time had passed since the matters took place that it would be contrary to equity and good conscience for the court to take cognizance thereof, and to require any answer to them. Section nineteen of the Act of April 22, 1850, reads as follows: 'An action for relief, not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued.' This section applies specifically to actions for equitable relief. Other sections of the Act provide for the limitation of actions at law. Subdivision four of section 338 of the Code of Civil Procedure is as follows: 'An action for relief on the ground of fraud or mistake must be brought within four years after the cause of action accrues; the cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.'

"The power of attorney from Teall to Devine was on record from March, 1852, and open to the daily inspection of the complainants and of all parties interested in the title to the property. They could have ascertained, by inquiry, from Teall at any time previous to his death, and from many others afterwards, the character of the title and the reasons why the property was allowed to remain in its then condition and under the control of an attorney in fact of Teall. And the conveyances from Devine to Rhodes and from Rhodes to Devine, which are stated in the bill

to have been made previous to August 1, 1857, were placed on record on the 8th of October, 1857, and remained on record ever afterwards, open to the inspection of all parties desirous of obtaining information respecting their execution or the property to which they related. As the complainants and all other parties interested could have obtained the necessary knowledge upon those subjects by proper inquiries, they are charged with such knowledge from the time those conveyances were placed on record, and held to all the consequences following its acquisition."

An exhaustive brief on the exact point involved in this appeal is contained in 76 A. L. R. 869-870. From the authorities therein collected, it appears that the jurisdictions divide in two lines of decision, one group holding that while documents on the public record are notice of their contents, they are not notice of more; that is, a deed given in fraud of creditors and recorded is notice only of the recitations therein contained, and if there is nothing suspicious upon the face of the document, there is no notice of underlying fraud sufficient to place a defrauded creditor upon inquiry. The other line of decision, probably the majority rule, holds that the deed in itself if recorded is sufficient to place the defrauded creditor upon notice of any fraud in its execution and delivery, such as lack of consideration, etc.

There are no cases holding that the recordation of a deed containing full recitation of the facts surrounding its execution and delivery is not notice of those facts to any creditor claiming to have been defrauded thereby.

In the case at hand, the declaration of trust, the deed, and the resolution of the Church board accepting the deed, and releasing Marwick were all on record more than four years prior to the inception of the bankruptcy proceedings and more than six years prior to the commencement of this action. Whichever of the established rules may be followed, it can hardly be contended that the documents do not contain recitations completely explaining the circumstances under which the property was transferred. As a matter of fact, the trial court found sufficient in the documents to overthrow the testimony of the only witness testifying as to consideration for the deed. Surely, if the recitations in the documents are sufficient to negative the testimony that there was consideration and warrant findings that consideration was lacking, they are sufficient to constitute notice of such want of consideration to creditors.

Summary.

I. The evidence was not such as to justify the finding that the transfer in question was not supported by consideration.

II. Even assuming that the finding of want of consideration was proper, the evidence did not justify the court in finding that the transfer was void as to existing creditors because made at a time when the bankrupt was insolvent, the evidence showing conclusively and without conflict that the transfer was made while the bankrupt was presumably solvent and prior to the dates when his creditors' claims arose.

III. Even assuming want of consideration and that the transfer did not occur until 1932, still the evidence showed conclusively and without conflict that the proceedings were barred by Section 338-4 of the Code of Civil Procedure of the State of California, and the finding of the court that the action was not barred is erroneous.

Conclusion.

For the foregoing reasons it is urged that the judgment of the court below should be reversed.

Respectfully submitted,

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